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EXAMINER

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Paper No. 19

Application Number: 09/306,552
Filing Date: May 06, 1999
Appellant(s): TAGGART, THOMAS D.

Arlen L. Olsen
For Appellant

EXAMINER'S ANSWER

This is in response to appellant's brief on appeal filed 10/10/2001.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is correct.

(7) *Grouping of Claims*

Appellant's brief includes a statement that claims 1-19 and 21 are rejected. The grouping of the claims are: claims 1-12, 15, 16, 19, and 21 stand or fall together; claims 13 and 14 stand or fall together; claim 17 stands or falls together; and claim 35 stands or falls together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

(8) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) *Prior Art of Record*

2,491,015	Poole	12-1949
4,862,933	Gies	9-1989

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5,770,232

Sizer et al.

6-1998

5,799,464

Olsson

9-1998

(10) *Grounds of Rejection*

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-11, 16, 17, 19, 21 and 35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gies (4,862,933) in view of Olsson (5,799,464).

Gies discloses a method for aseptically packaging aseptically sterilized foodstuffs comprising the steps of: providing a plurality of containers (cups 15); aseptically disinfecting the plurality of containers (apparatus 19) see for example (column 4, lines 18-23); aseptically filling the aseptically disinfected plurality of containers with the foodstuffs (apparatus 20) see for example (column 4, lines 23-25); and filling the aseptically disinfected plurality of containers at a rate greater than 100 container per minute (column 4, lines 35 and 36) the machine can be operated to produce 33,600 packages per hour which is equal to 560 packages per minute. Gies does not disclose the container is bottle nor sterilizing the foodstuffs before bottling. However, Olsson discloses containers made of glass or plastic bottles was filled with product from a filling machine (column 3, lines 38-45). Note that applicant admitted that it is well known in the art to sterilize food product in sterilizing packaging systems (Background Of The Invention; first paragraph) to store the food without refrigeration in shelves for a period of time at least twice as long as the storage period of the refrigerated non-sterile food.

Therefore, it would have been obvious to one with ordinary skill in the art at the time the invention was made to have modified Gies's method for aseptically packaging aseptically sterilized foodstuffs by having containers made of glass or plastic bottles, as suggested by Olsson

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and because it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice.

In re Leshin, 125 USPQ 416; and by sterilizing the foodstuffs before packaging as suggested by the applicant's prior art, in order to store the food without refrigeration in shelves for a period of time at least twice as long as the storage period of the refrigerated non-sterile food.

Gies does not disclose specifically the level of disinfecting the containers to at least 6 log reduction in spore organisms. However, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified Gies's method for aseptically packaging aseptically sterilized foodstuffs by having the level of disinfecting the containers to at least 6 log reduction in spore organisms, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

Regarding claim 4 and 5: the reference of the prior art discloses the claimed invention except for the plastic is high density polyethylene. However, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified Gies's method for aseptically packaging aseptically sterilized foodstuffs by having plastic with high density polyethylene, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin; supra*.

Regarding claim 6: Gies discloses capping the container with aseptically disinfected lid (device 21) see for example (column 1, lines 37-39).

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Regarding claims 8 and 11: Gies discloses disinfecting the interior of the plurality of containers with a hydrogen peroxide (column 1, lines 26-29).

Regarding claim 9: Gies discloses disinfecting the interior of the plurality of the plurality of container includes the application of the hydrogen peroxide spray and the activation and removal of the hydrogen peroxide using a sterilized air (column 1, lines 56-68 and column 2, lines 1 and 2). Gies does not disclose the range of the application of the hot hydrogen peroxide for about 1 second and the removal of the hot hydrogen peroxide using hot air about 24 seconds. However, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified Gies's method for aseptically packaging aseptically sterilized foodstuffs by having range of the application of the hot hydrogen peroxide for about 1 second and the removal of the hot hydrogen peroxide using hot air about 24 seconds, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. *In re Aller*, 105 USPQ 233.

Regarding claim 10: Gies discloses a feedback control system (controller 60) for maintaining aseptic container conditions.

Regarding claims 17, 19, and 35: Gies does not disclose specifically the exact level of the sterilization of the foodstuffs to at least 12 log reduction in clostridium botulinum nor the residual level of hydrogen peroxide is less than .5ppm. However, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified Gies's method for aseptically packaging aseptically sterilized foodstuffs by having the level of the sterilization of the foodstuffs to at least 12 log reduction in clostridium botulinum and the

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residual level of hydrogen peroxide is less than .5ppm, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

Regarding claim 21: Gies discloses a device for aseptically packaging aseptically sterilized foodstuffs comprising means for providing a plurality of containers (picker device 17); means for aseptically disinfecting the plurality of containers (apparatus 19) see for example (column 4, lines 18-23); means for aseptically filling the aseptically disinfected plurality of containers with the aseptically sterilized foodstuffs (apparatus 20) see for example (column 4, lines 23-25); and means for filling the aseptically disinfected plurality of containers at a rate greater than 100 container per minute (column 4, lines 35 and 36) the machine can be operated to produce 33,600 packages per hour which is equal to 560 packages per minute. Gies does not disclose the container is bottle. However, Olsson discloses containers made of glass or plastic bottles was filled with product from a filling machine (column 3, lines 38-45) to improve transferring the filled container (column 2, lines 25 and 26).

Therefore, it would have been obvious to one with ordinary skill in the art at the time the invention was made to have modified Gies's device for aseptically packaging aseptically sterilized foodstuffs by having containers made of glass or plastic bottles, as suggested by Olsson, in order to improve transferring the filled container.

Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over the prior art as applied to claim 1 above, and further in view of Sizer et al. (5,770,232).

Gies and Olsson do not disclose a disinfecting the container by providing oxonia. However, Sizer discloses method of disinfecting the food container by using oxonia (column 2,

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lines 35-40) to improve the method of disinfecting the food contact surfaces of a food packaging machine (column 3, lines 19 and 20).

Therefore, it would have been obvious to one with ordinary skill in the art at the time the invention was made to have modified Gies's method for aseptically packaging aseptically sterilized foodstuffs by disinfecting the container by providing oxonia, as suggested by Sizer, in order to improve the method of disinfecting the food contact surfaces of a food packaging machine.

Claims 13 and 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over the prior art as applied to claim 1 above, and further in view of B. Poole (2,491,015).

Gies and Olsson failed to disclose that disinfecting the container from the outside surfaces. However, Poole discloses method of sterilizing food containers (39) from outside (Fig. 4) the food containers (39) fed into a sterilizing fluid tank (1), see for example (column 1, lines 51-55) to sterilize all the parts of the container (column 1, lines 22 and 23).

Therefore, it would have been obvious to one with ordinary skill in the art at the time the invention was made to have modified Gies's method for aseptically packaging aseptically sterilized foodstuffs by disinfecting the container from the outside surfaces, as suggested by Poole, in order to sterilize all the parts of the container.

Regarding claim 14: Gies discloses disinfecting the interior of the plurality of the plurality of container includes the application of the hydrogen peroxide spray and the activation and removal of the hydrogen peroxide using a sterilized air (column 1, lines 56-68 and column 2, lines 1 and 2). Gies and Olsson failed to disclose that disinfecting the container from the outside surfaces. However, Poole discloses method of sterilizing food containers (39) from outside (Fig.

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4) the food containers (39) fed into a sterilizing fluid tank (1), see for example (column 1, lines 51-55) to sterilize all the parts of the container (column 1, lines 22 and 23). The prior art do not disclose the range of the application of the hot hydrogen peroxide for about 1 second and the removal of the hot hydrogen peroxide using hot air about 24 seconds. However, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified Gies's method for aseptically packaging aseptically sterilized foodstuffs by having range of the application of the hot hydrogen peroxide for about 1 second and the removal of the hot hydrogen peroxide using hot air about 24 seconds, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. *In re Aller*, 105 USPQ 233.

Claim 15 is rejected under 35 U.S.C. 103(a) as being unpatentable over the prior art as applied to claim 1 above, and further in view of B. Poole (2,491,015) and Sizer et al. (5,770,232).

Gies and Olsson failed to disclose that disinfecting the container from the outside surfaces by providing oxonia. However, Poole discloses method of sterilizing food containers (39) from outside (Fig. 4) the food containers (39) fed into a sterilizing fluid tank (1), see for example (column 1, lines 51-55) to sterilize all the parts of the container (column 1, lines 22 and 23) and Sizer discloses method of disinfecting the food container by using oxonia (column 2, lines 35-40) to improve the method of disinfecting the food contact surfaces of a food packaging machine (column 3, lines 19 and 20).

Therefore, it would have been obvious to one with ordinary skill in the art at the time the invention was made to have modified Gies's method for aseptically packaging aseptically

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sterilized foodstuffs by sterilizing food containers from outside, as suggested by Poole, in order to sterilize all the parts of the container; and by disinfecting the food container by using oxonia, as suggested by Sizer, in order to improve the method of disinfecting the food contact surfaces of a food packaging machine.

(11) Response to Argument

Appellant contends that Gies used the term “sterilize” and does not teach or suggest either explicitly or inherently “aseptic” or “aseptically”. The examiner believes that Gies as modified by involving of routine skill in the art will be able to sterilize the food product to a level at least 12 log and the container to a level at least 6 log as the applicant claimed, that will be considered as aseptic.

Appellant argues that the invention can fill aseptically disinfected bottles at a rate greater than 100 bottles per minute while still meeting the requirements of being aseptic. The examiner believes that Gies meet the requirements of aseptic the container and clearly discloses the rate of the filling and disinfecting the container is greater than 100 bottle per minute (column 4, lines 33-36).

Appellant also argues that the container as disclosed and claimed include bottles. The examiner believes that Olsson discloses container as bottles and being filled from a filling machine (column 1, lines 10-15). The applicant also argue that it is not obvious to combine Olsson with Gies because the shape, size, as well as, the material of the bottles used in Olsson’s bottle is different that Gies cups, the interior surface of a bottle or jar is much more difficult to aseptically sterilize than the interior or a cup. The examiner believes that it is just a matter or engineering design choice, since both references are referring to sterilizing and filling machine,

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the examiner also believes that sterilizing and filling bottles is very old and well known in the art.

Appellant argues that it is not obvious to combine Gies's reference which discloses sterilizing in a packaging system using cups and Olsson's reference which discloses transporting open, filled pharmaceutical containers. The examiner believes that it is obvious to combine both references since both of them discloses filling containers in different shapes, such as cups as disclosed in Gies's reference and bottles as disclosed in Olsson's reference.

In response to appellant's argument that Gies's would not work when combined with Poole is nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, both references are directed to sterilizing containers, Gies sterilize inside the containers and Poole sterilize outside the containers, therefore, it would been obvious to combine both references to improve the method of disinfecting the food contact surfaces of a food packaging machine.

For the reasons above, the grounds of rejection are deemed proper and should be sustained.

ST
June 14, 2002

Rada, Rinaldi
Sipos, John

EUGENE KIM
PRIMARY EXAMINER

